No. 8536

Supreme Court of Illinois

Henry Farr, et al

vs.

Isaac Scott

71641 7

May 2

Supreme Court of Illinois
2d ~~1st~~ Grand Division

Henry Harris ~~et al~~,
George L. Rutherford
vs.
Isaac Scott

} Appeal from St Clair.

And now comes George L. Rutherford appellant and says that in the record and proceedings aforesaid there is manifest error in this to wit the court below erred in finding the issue of fact for the pltff below 2d In refusing to grant appellant a new trial wherefore appellant prays that the judgment below may be reversed &c

Wm H Underwood
Atty for said appellant

Joinder in error
Marshall W. Weir
Atty for appellee

[8531-13]

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TRANSCRIPT OF PROCEEDINGS IN SUIT.—Culver, Page & Hoyne, Static

UNITED STATES OF AMERICA,
State of Illinois,
Saint Clair COUNTY. } ss. In Circuit Court, October Term A.D. 1868

PLEAS, before the Honorable Joseph Gillespie Judge of the twenty fourth Judicial Circuit of the State of Illinois, and sole presiding Judge of the Circuit Court of Saint Clair County, in the State aforesaid, and at a term thereof begun and held at the Court House in the City of Belleville in said County, on the fourth Monday (being the twenty sixth day) of October in the year of our Lord one thousand eight hundred and Sixty-Eight and of the Independence of the said United States the ~~eighty~~ Ninety second

Present, Honorable Joseph Gillespie Judge of the 24th Judicial Circuit of the State of Illinois.

Robert A. Halbert Esq. States Attorney.

Charles Becker Esq. Sheriff.

Attest, Henry A. Kircher Clerk.

Be it remembered that on the 21st day of October A.D. 1868 the following writ was issued, to wit:

Trespass Summons.

State of Illinois
County of St. Clair } Set

The People of the State of Illinois
To the Sheriff of St. Clair County.

We Command you to summon

Henry Farr &
George L. Rutherford.

if they can be found in your County, to be and appear in the St. Clair Circuit Court, on the first day of the next term thereof, to be holden at the Court House in the City of Belleville, in said County, on the 4th Monday of October next, then and there to answer unto Isaac Scott

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of a plea of Trespass on the case upon promises to the plaintiffs damage as he says of the sum of

Three hundred Dollars

and not to fail under penalty of what the law directs And this writ you shall have at our said Court with your return endorsed thereon

Witness Henry A. Kircher, Clerk of the Circuit Court, and the seal hereunto affixed, at office this 12th day of October A.D. one thousand eight hundred and sixty eight

(Seal)

Henry A. Kircher
Clerk.

Upon which writ appeared the following deputation
I hereby deputize Joseph Landgraff to serve this writ. Oct. 12th 1868

Charles Becker Shff.

Upon which writ appeared the following Endorsement.

Served by reading to the within named defendants Henry Farr and Geo. L. Rutherford

Oct. 16th 1868

Charles Becker Shff
By Jos. Landgraff Spec dy.

Serv & Ret. 110
Mileage 90
$200

Filed Oct 21-1868 Henry A. Kircher
Clerk Circuit Court St. Clair Co Ills

A.D. 1868

Be it remembered that on the 16th day of October the following declaration was filed.

State of Illinois } In the St. Clair County Circuit
St. Clair County } ss Court, at the October Term
thereof A.D. 1868

Isaac Scott, the plaintiff in this suit, by Marshall H. Weir his attorney complains of Henry Farr and George L. Rutherford, the defendants, in a plea of trespass on the case on promises. For that whereas the said defendants, and one Samuel M. Stites, since deceased, heretofore, to wit: on the 11th day of March in the year of our Lord One Thousand Eight Hundred and Sixty Eight, to wit: the County aforesaid, made their certain promissory note in writing, and then and there delivered the same to the said plaintiff, in and by which said note, said defendants and the said Samuel M. Stites, since deceased, in his life time by the name, style, and description of Henry Farr Samuel M. Stites, and Geo. L. Rutherford jointly and severally promised to pay to said plaintiff twelve months after the date thereof the sum of Two Hundred Dollars in Gold, with interest thereon at the rate of ten per cent per annum from the date thereof until paid for value received. By means whereof, and by force of the Statute in such case made and provided, the said defendants and the said Samuel M. Stites, since deceased in his lifetime, then and there became liable to pay to the said plaintiff the said sum of money in said promissory note specified, according

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to the tenor and effect of said promissory note, to wit: at the place aforesaid, and being so liable they, the defendants, and the said Samuel M. Stites since deceased, in his lifetime, in consideration thereof afterwards, to wit: on the day and year aforesaid, at, to wit: the County aforesaid undertook and then and there faithfully promised the said plaintiff jointly and severally to pay him the said sum of money in the said promissory note specified according to the tenor and effect thereof.

And Whereas also the said defendants and the said Samuel M. Stites, since deceased in his lifetime, afterwards, to wit: on the 1st day of September AD 1862 at to wit: the County aforesaid became and were indebted to the plaintiff in a large sum of money to wit: Three Hundred Dollars for money before that time lent and advanced to, and paid, laid out and expended for said defendants, and said Stites, since deceased by said plaintiff, at their request, and for money before that time had and received by said defendants and said Stites, since deceased in his lifetime to and for the use of said plaintiff and also in a like sum for goods, wares and merchandise before that time sold and delivered by said plaintiff to said defendants, and said Stites, since deceased, in his lifetime, at like special instance and request, and also in the like sum for the labor, care and diligence of said plaintiff before that time done and performed by said plaintiff for said defendants, and said Stites since deceased, in his lifetime

and at like special instance and request. And being so indebted said defendants and the said Samuel M. Stites, since deceased in his lifetime, in consideration thereof then and there jointly and severally undertook and promised to pay said plaintiff said last mentioned sum of money when thereunto afterwards requested. Nevertheless the said defendants, and said Samuel M. Stites, in the life time of the said Samuel M. Stites, and the defendants since the death of said Samuel M. Stites, not regarding the said several promises so by them made as aforesaid, but contriving &c have not, nor each either of them as yet paid the several sums of money, or any or either of them or any part thereof to the said plaintiff, although often requested so to do. But to pay the same or any part thereof to the said plaintiff, the said defendants and the said Samuel M. Stites, in the lifetime of the said Samuel M. Stites, wholly refused, and the said defendants have ever since the death of said Samuel M. Stites withheld wholly refused and still refuse so to do. To the damage of plaintiff of Three Hundred Dollars, and therefore he brings suit &c.

By Marshall N. Weir Atty for Pltiff

Copy of note, and account sued on.

Twelve months after date for value recd we or either of us promise to pay Isaac Scott the sum of two Hundred dollars in Gold together with ten per cent interest from date until

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7 paid as witness our hands this March 11th 1862

$200

Henry Farr
Samuel M. Stites
Geo. L. Rutherford.

Copy of endorsements on said note -
Rec'd 6 months interest on the within note
Rec'd 6 months interest on the within note
Rec'd 6 months interest on the within
Rec'd 1 years interest on the within

Henry Farr and George L. Rutherford
To Isaac Scott - Dr.

To money lent & advanced & paid, laid out & expended ~~for~~ defendants and Samuel M. Stites, since deceased in his lifetime $300

To money had and received by defendants and said Samuel M. Stites, since deceased in his lifetime - $300

To goods, wares & merchandise sold & delivered to defendants & Samuel M. Stites since deceased in his lifetime — $300

To work and labor done for defendants and said Samuel M. Stites, since deceased, in his lifetime, $300

Be it remembered that on the 26th day of Oct. AD 1868 the following plea was filed. Viz:

Isaac Scott
vs.
Henry Farr &
George L. Rutherford.

} Assumpsit.

And the said George L.

Rutherford impleaded as above comes & defends the wrong and injury when &c and says he did not undertake or promise in manner & form as the said plaintiff hath above thereof complained & of this said defendant puts himself upon the country &c.

And the plaintiff doth the like. By M. M. Weir his atty.

And for further plea in this behalf as to the 1st count of said pltffs declaration said deft says actio non. because he says that at and before the making of the said promissory note in said count mentioned to wit: on &c. at &c. aforesaid, the said Henry Farr and his wife for the purpose of securing the said Samuel Stites and this deft on account of the promissory note in said declaration mentioned upon which said note the said Farr was principal and this deft. and said Stites were securities, made their mortgage to this deft and said Stites upon a house & lot No. 70. Block 10. also one house and lot No 29. block No 4 in the town of O'Fallon, which said mortgage was duly recorded in the Recorder's Office in said County in book 23 pages 2 & 3. And afterwards to wit: on the 6th day of November A.D. 1863 at the County aforesaid the said Henry Farr being desirous of selling one of said lots free of said mortgage incumbrance the said pltff then and there in consideration that this deft. would then and there release said mortgage of record and enter the same

satisfied then and there agreed to discharge this deft from all liability on account of the promissory note in said Count mentioned. And this deft avers that in consideration thereof he did then and there enter of record on the margin of said mortgage the same as satisfied of which said pltff then & there & before the commencement of this suit had notice, wherefore this deft. says that said deft was & is discharged from the said promissory note and this said deft. is ready to verify wherefore he prays Judgment &c.

And for further plea in this behalf the said deft says actio non, as to said first Count because he says that this deft and said States, were in fact securities for said Farr in the making of said promissory note and at & before the making of said promissory note to wit on the at & aforesaid, the said Farr made and delivered to this deft, and said States to indemnify them as such securities a mortgage upon certain property and lots in O'Fallon in said County, which mortgage is recorded in the Recorder's Office in said County in book 23 pages 283, And afterwards to wit on the 6th day of November AD 1863 at the County aforesaid the said pltff and said Farr being desirous to have said mortgage satisfied of record, the said pltff then and there agreed to discharge this deft from all liability on account of said promissory note if this deft would then & there enter said

mortgage satisfied. And this deft avers that in consideration thereof he did then and there enter said mortgage satisfied of record whereby this deft became & is discharged from all liability on account of said promissory note and this said deft will verify wherefore he prays judgment &c.

Underwood & Nottingham
Attys for Rutherford.

Be it remembered that on the 5th day of Nov. AD 1868 the following Replication was filed, to wit:

Isaac Scott
vs.
Henry Farr &
George L. Rutherford
} Replication.

And the plaintiff as to the second and third pleas by the defendant Rutherford above pleaded says precludi non, because said plaintiff says that he did not agree with the defendant Rutherford to discharge said Rutherford from all liability on account of the promissory note in plaintiff's first Count mentioned, in manner and form as alledged in said pleas or either of them by said defendant Rutherford, and of this plaintiff puts himself upon the Country

By M. W. Weir, pltffs Atty

Deft doth the like

R. & N. attys for Rutherford.

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Be it remembered that at the October Term of said Court the following proceedings were had

On the first Wednesday the demurrer to the 2nd & 3d plea filed by the defendant Rutherford is overruled, and leave is given to plaintiff to file a replication. On the third Friday on motion of plaintiff's attorney the Court orders that defendant Farr be called and he is three times solemnly called but comes not but makes default herein. Judgement is therefore rendered against said defendant Farr for default of plea.

On the fifth Saturday this cause is tried as to defendant Rutherford by the Court by consent of parties, and after hearing the evidence and arguments of Counsel the Court renders judgement in favor of plaintiff and against said defendant, and assesses the damages at $281.00, the damages being at that time assessed against both defendants.

And now comes defendant and moves the Court for a new trial which motion is denied by the Court. It is therefore ordered and considered by the Court that plaintiff recover from said defendants the said sum of $281. damages and costs of suit herein to be taxed and that he have execution therefor - Defendant Rutherford prays an appeal to the Supreme Court of the State of Illinois which is allowed upon defendant filing his bill of exceptions and a bond in the penal sum of $500 within thirty days - security on said bond to be approved by the Clerk

Be it remembered that on the 7th day of December A.D. 1868 the following bill of exceptions was filed, to wit:

Isaac Scott
vs.
Geo L. Rutherford } Assumpsit.

Be it remembered that this case was tried by the Court by consent. Plaintiff introduced in evidence the following promissory note.

Twelve months after date for value Recd we or either of us promise to pay Isaac Scott the sum of two hundred dollars in gold together with ten per cent interest from date until paid, as witness our hands this March 11th 1862.
$200.

Henry Farr
Samuel M. Stites.
Geo. L. Rutherford

Endorsed as follows. Recd 6 months interest on the within note. — Recd 6 months interest on the within note, — Recd 6 months interest on the within — Recd One years interest on the within — Stites, Henry Farr Rutherford March 11 - 1862 $200 — filed Dec. 17 1868 Henry Kurtz Clerk Circuit Court St. Clair Co Ills.

Henry Farr then testified that he was principal in said promissory note and the other two makers were securities that in November 1863 witness was desirous of selling one of the lots upon which he had given his securities, a mortgage to indemnify them as such securities, and proposed to plaintiff to give him a mortgage on the other of said lots; and that defendant Rutherford and plaintiff were at the house of witness in O'Fallon, and that witness promised plaintiff to give him a mortgage on said lot, and plaintiff promised Rutherford if he would release the mortgage to him and Stites on the record Rutherford and Stites should be discharged from said note. That Rutherford released said mortgage accordingly; and witness

made a mortgage on said lot to plaintiff and had same stamped and acknowledged before a Justice of the Peace which mortgage plaintiff never called for afterwards, nor ever received. Witness then conveyed the other lot to one Crouse.

James H. Scott testified that some nine months ago he told plaintiff that Rutherford said he, (Rutherford) ought not to pay the note, that plaintiff had agreed to release him, if he would enter the mortgage satisfied. plaintiff told witness that was so, but it was on the condition that Farr should pay the note which he had not done. That plaintiff thought that Rutherford ought to have seen that Farr paid the note

Geo L. Rutherford, defendant, testified that by appointment he and plaintiff met at the house of Farr and witness refused to enter the mortgage satisfied unless plaintiff would release him and Stiles from the note sued on, and he asked plaintiff if he would do so to which plaintiff assented, and then witness came to Belleville and entered said mortgage satisfied of record. A year or so after Farr had moved to Missouri plaintiff came to witness and enquired about the note, and told witness it was unpaid. Witness then was somewhat astonished and called plaintiff's attention to said agreement to discharge him. plaintiff said he had forgotten about the mortgage. Farr was to give him, and would look among his papers at home, and would ascertain at Belleville if he had

not left it there to be recorded. Afterwards Witness requested plaintiff to sue upon the note that he might make his defence, that Witness had confided in the honor of plaintiff.

Isaac Scott, plaintiff, testified that Farr proposed to Witness to take a mortgage on one of said lots to secure him so that Rutherford and Stites could release their mortgage and thereby enable Farr to sell one of said lots. Witness consented that such an arrangement might be made. That Rutherford afterwards asked Witness if he agreed to that arrangement to which plaintiff assented. Witness further testified that he never agreed to release Rutherford without first getting a mortgage on one of said lots, that no such mortgage had ever been given to him or tendered to him. That about a year after the Conversation with Farr Witness spoke to Rutherford about the note, when Rutherford told him (Witness) that he (Rutherford) had satisfied his mortgage which was the first intimation Witness had that Rutherford had satisfied the mortgage Witness then told Rutherford that he (Rutherford) had been too hasty, that he should have seen that Witness had a mortgage before satisfying his own. Witness further testified that the security he consented to take was not as good as that which he already had, and that he had no interest whatever in making the change. That after the Conversation with Rutherford he did look among his papers and at the Recorders

Office in Belleville, although positive that he never received such a mortgage. Witness further stated that Rutherford never at any time asked for or demanded of him the note sued on. Witness further testified that according to the agreement made with Farr & Farr, was first to make a mortgage to witness, then Rutherford and Stites might be released.

This was all the evidence in the case upon which the Court for plaintiff the amount due on said note, whereupon defendant Rutherford moved for a new trial because the finding was contrary to law, and to evidence, which motion was overruled by the Court, and to which decision of the Court said deft. at the time excepted, and prays this bill of exceptions may be signed sealed and made a part of the record, which is done.

L. Gillespie (Seal)
Judge 24th Jud. dis. Ills.

Be it remembered that on the 16th day of Dec. A.D. 1868 the following bond was filed, viz.

Know all men by these presents that we George L. Rutherford and James H. Scott & James H. Atkinson of the County of St. Clair and State of Illinois, are held and firmly bound unto Isaac Scott in the penal sum of five Hundred Dollars for the the payment of

16 which well and truly to be made, we bind ourselves our heirs, executors administrators and assigns jointly and severally by these presents, this 10th day of December 1868. The Conditions of the foregoing obligation is such that whereas the said Isaac Scott did on the 28th of November 1868 at the October Term of the St. Clair Illinois Circuit Court in said Court in an action of Assumpsit, then in said Court pending obtain a judgement against the above bounden George L. Rutherford and Henry Farr for two hundred and eighty one damages, and costs of suit from which judgement the said Rutherford prayed for and obtained an appeal to the Supreme Court to be heard at Springfield in said State by Consent, Now therefore if the said George L. Rutherford shall duly prosecute his appeal and shall pay said judgement, costs interest and damages in case, the said judgement shall be affirmed, then the above obligation to be void, otherwise to remain in full force and effect.

Witness our hands and seals this the day and year above written.

Approved by me this 16th day of December 1868
Henry Kircher
Clerk

G. L. Rutherford (seal)
James H. Scott.
James H. Atkinson (seal)

I, Henry A. Kircher Clerk of the Circuit Court of said Saint Clair County, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of the summons, declaration, defts pleas, plaintiffs replication, proceedings of court, bill of exceptions, note and appeal bond in a certain cause heretofore pending in said Court, on the Law side thereof, wherein Isaac Scott was plaintiff and Henry Farr and George L. Rutherford were Defendants.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Court, at Belleville this seventeenth day of December A.D. 1868

Henry A. Kircher Clerk.

(2031-10)

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Transcript of Proceedings
IN SUIT.

CIRCUIT COURT.

Saint Clair County.

October Term, 1868

In the matter of

Henry Farr vs.

George L. Rutherford
Appellant vs.

Isaac Scott

Culver, Page & Hoyne, Stationers, Chicago.

Appeal from St Clair

Clerk of Supreme Court
will docket this case
W M Underwood
Atty. for appellant

8536

Transcript fees $4 25/100 paid by
G. S. Rutherford
Mier. dis'd

Case
~~106~~
101
50 Ill

Farr et al
v.
Scott

Mr. Justice Lawrence delivered the opinion of the Court:

This record presents only a question of evidence. Did or did not the payee of the note promise the security to release him if he, the security, would release the mortgage held by him against the principal, or was the principal to execute a new mortgage on another lot to the payee before the security was to be released. The parties themselves are the only witnesses whose testimony is important, and they swear to a different understanding of the agreement. The court gave credit to the evidence of the plaintiff, probably because the agreement as stated by him was more in consonance with the ordinary mode of making such an arrangement, and we see no reason for saying the court erred in this. It does

[5556-11]

not appear that the payee had any interest in the release of the mortgage made by the principal to his security and why should he have promised to release the security before the new mortgage to himself should be executed. There is no ground for reversing the judgment.

Judgment affirmed

[p.536-12]

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Farr et al
v
Scott

60

Opinion
Lawrence J

29
12
41
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287
2
574

O. K.

Recorded

Supreme Court of Illinois---First Grand Division.

JUNE TERM, 1869.

HENRY FARR AND GEORGE L. RUTHERFORD
vs.
ISAAC SCOTT.
} Appeal from St. Clair.

Page 4 Isaac Scott brought an action of assumpsit in the St. Clair Circuit Court, at its October term, 1868, on a promissory note made to him by Henry Farr, George L. Rutherford, and Samuel Stites, since deceased, dated March 11, 1862, for the payment of $200 in gold, twelve months after date,
" 5 with interest at ten per cent from date. The declaration has first count on said note, and adds
" 8 the common counts. Farr let judgment go by default. Rutherford plead—1st, the general issue; 2d, to 1st count, that at and before the making of said note, said Farr and wife, for the purpose of securing said Stites and Rutherford on account of said note, upon which note Farr was principal and said Rutherford and Stites securities, made their mortgage to Rutherford and Stites upon two lots (described) in the town of O'Fallon, recorded, &c., in the Recorder's office of said county. And afterwards, to-wit: on the 6th of November, 1863, at the county aforesaid, the said Farr being desirous of selling one of said lots free from said mortgage incumbrance, the said plaintiff then and there, in consideration that said Rutherford would then and there release said
" 9 mortgage of record and enter the same satisfied, then and there agreed to discharge said Rutherford from all liability, on account of said promissory note. Plea then avers that Rutherford, in consideration thereof, did then and there enter of record on the margin of said mortgage, the same as satisfied, of which said plaintiff then and there and before the commencement of this suit had notice; wherefore said defendant says he was and is discharged from said promissory note, and this he was ready to verify, wherefore he prayed judgment, &c.

3d. Plea of Rutherford to 1st count avers that said Rutherford and Stites were in fact mere securities for said Farr on said note, and at and before the making thereof, to-wit: on &c., at &c., aforesaid, said Farr made and delivered to said securities, to indemnify them as such securities, a mortgage upon certain property and lots in O'Fallon, in said county, which mortgage is recorded in the Recorder's office in said county in book J 3, page 283. And afterwards, to-wit: on the 6th of November, A. D. 1863, at the county aforesaid, said plaintiff and said Farr being desirous to have said mortgage satisfied of record, the said plaintiff then and there agreed to discharge said Rutherford from all liability on account of said promissory note if said Rutherford would then and there enter said mortgage satisfied. Plea avers that in consideration thereof said Rutherford did then and there enter said mortgage satisfied of record, whereby, &c. (conclusion as in second plea.)

" 10 Pltff. took issue on 1st plea and replied to second and third pleas that he did not agree with the defendant, Rutherford, to discharge him from all liability, on account of the note sued on, in manner and form as alleged in said pleas, or either of them; and concluded to the country, upon which there was issue.

" 12 The suit was tried by the Court by consent. Plaintiff then introduced in evidence the promissory note sued on, with a credit on the back of two and a half years' interest endorsed. Henry Farr, witness, (for deft.) testified that he was principal on said promissory note, and the other two makers were securities. That in November, 1863, witness was desirous of selling one of the lots upon which he had given his securities a mortgage to indemnify them as such securities, and proposed to plaintiff to give him a mortgage on the other of said lots, and that Rutherford and plaintiff were at the house of witness in O'Fallon, and that witness promised plaintiff to give him a mortgage on said lot, and that plaintiff promised Rutherford if he would release the mortgage to him and Stites, on the record, Rutherford and Stites should be discharged from said note. That Rutherford released said mortgage accordingly, and witness made a mortgage on
' 13 said lot to plaintiff, and had the same stamped and acknowledged before a justice of the peace, which mortgage plaintiff never called for afterwards and never received. Witness conveyed the other lot to one Crouse.

James H. Scott testified that some nine months ago he told plaintiff that Rutherford said he, Rutherford, ought not to pay the note; that plaintiff had agreed to release him if he would enter the mortgage satisfied. Plaintiff told witness that was so, but it was on the condition that Farr would pay the note, which he had not done. That plaintiff thought that Rutherford ought to have seen that Farr paid the note.

George L. Rutherford testified that by appointment he and plaintiff met at the house of Farr, and witness refused to enter the mortgage satisfied unless plaintiff would release him and Stites from the note sued on, and he asked plaintiff if he would do so, to which plaintiff assented, and then witness came to Belleville and entered said mortgage satisfied of record. A year or so after Farr had removed to Missouri plaintiff came to witness and inquired about the note, and told witness it was unpaid. Witness then was somewhat astonished, and called plaintiff's attention to said agreement to discharge him. Plaintiff said he had forgotten about the mortgage Farr was to give him, and would look among his papers at home, and would ascertain at Belleville if he had not left it there to be recorded. Afterwards witness requested plaintiff to sue upon the note,
' 14 that he might make his defense. That witness had confided in the honor of plaintiff.

Isaac Scott, pltff., testified that Farr proposed to witness to take a mortgage on one of said lots, to secure him, so that Rutherford and Stites could release their mortgage and thereby enable Farr to sell one of said lots. Witness consented that such an arrangement might be made. That Rutherford afterwards asked witness if he agreed to that arrangement, to which plaintiff assented. Witness further testified that that he never agreed to release Rutherford without first getting a mortgage on one of said lots. That no such mortgage had ever been given to him or tendered to him. That about a year after the conversation with Farr witness spoke to Rutherford about the note, when Rutherford told him (witness) that he (Rutherford) had satisfied his mortgage, which was the first intimation witness had that Rutherford had satisfied the mortgage. Witness then told Rutherford that he (Rutherford) had been too hasty; that he should have seen that witness had a mortgage before satisfying his own. Witness further testified that the

security he consented to take was not so good as that he already had, and that he had no interest whatever in making the change. That after the conversation with Rutherford he did look among his papers and at the Recorder's office in Belleville, although positive that he never received such a mortgage. Witness further stated that Rutherford never at any time asked for or
" 15 demanded the note sued on. Witness further testified that according to the agreement made with Farr, he, Farr, was first to make a mortgage to witness; then Rutherford and Stites might be released. This was all the evidence in the case, after which the Court found for Scott the amount due on said note; whereupon Rutherford moved for a new trial, because the finding was contrary to law and to evidence, which motion was overruled by the Court, and to which decision
11, 16 of the Court Rutherford at the time excepted. Appeal to Supreme Court allowed and bond filed.
" 1 Rutherford assigns for error the finding of the issue of fact for Scott and the refusing to grant Rutherford a new trial.

BRIEF.

1. The only point by the pleadings in issue is: Did Scott agree to discharge Rutherford if he entered his mortgage satisfied? Farr and Rutherford swear that he did, and he admitted substantially the same thing to James H. Scott. Scott, the pltff. below, has a memory so defective that he cannot rely upon it himself, and from the testimony of the other witnesses no Court could safely rely on it. In his conversation with James H. Scott and with Rutherford, when he first spoke of the note being unpaid, he appears to have forgotten all about the mortgage that was to be made to him and promised Rutherford to look and did look for it among his papers and at the Recorder's office in Belleville. Nine months before this suit the only reason he gives James H. Scott why Rutherford should pay this note was, that Rutherford was to be released on condition that Farr paid the note, and Rutherford ought to have seen, not that a new mortgage was made, but that Farr *paid* the note! He, however, now swears that he was first to have a new mortgage before Rutherford was to be released. He does not pretend that he told this to Rutherford either at the appointed meeting at Farr's or before Rutherford satisfied his mortgage. Farr appears to have made, stamped, and acknowledged before a justice of the peace a mortgage to Scott under the arrangement, which Scott never called for. It is not pretended by even Scott that Rutherford was to deliver him this mortgage or do anything with it. Rutherford did all any of the parties pretends he was to do to be discharged from the note, and by the conduct of Scott he lost the benefit of his mortgage, and ought not to suffer thereby.

2. Even where a note is joint and several, as between the parties and against the payee, it may be proved *aliunde* that only one of the makers was principal and the others securities. Kennedy, &c., vs. Evans, 31 Ill. R., 269. Wood vs. Stout, 32 Ill. R., 401, 409.

B. Any agreement between payee and principal of a note, made before or after its maturity, changing the terms of a note, without consent of security, discharges him at law and in equity. Warner vs. Campbell, 26 Ill. R., 285, 286. Flynn, &c., vs. Mudd, &c., 27 Ill. R., 326.

C. This defence may be made in a court of law, as well as in equity. 27 Ill. R. 327. Ward vs. Stout, 32 Ill. R., 401. Kennedy vs. Evans, 31 Ill. R., 269.

D. In Pearl vs. Wellmann, 11 Ill. R., 358, Trumbull, Judge. says, where a creditor does some act by which the security has lost or been induced to neglect the means which might have been used for his indemnity—as in 8 Fisk, 122, where the creditor told the security the debt was paid—the security is discharged. A creditor, who, by any act of his, has induced the security to believe that he was discharged, and thereby led him to part with his means of indemnity, ought to be estopped by such act from subsequently proceeding against the surety.

3. The finding was manifestly against the evidence and the weight of evidence, and a new trial should have been granted. Scott vs. Plumb, 2 Gil. 595; Keag vs. Hite, 12 Ill. R., 99; Swab vs. Gingerich, 13 Id., 698, 699; Goodner vs. Crooks, 11 Id., 142; Baker vs. Intchett, 16 Id., 66; Clement vs. Bushway, 25 Id., 200; Henry vs. Eddy, 34 Id., 514; Koester vs. Eslinger, June Term, 1867, at Mount Vernon. This is especially true when the case is tried by the Court.

WM. H. UNDERWOOD, Atty. for Appellant.

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Farr et al.

v.

Scott.

Abstract & Brief

8536

Filed 1st June 1869

R. H. Williams

Clk

Supreme Court of Illinois---First Grand Division.

JUNE TERM, 1869.

HENRY FARR & GEORGE L. RUTHERFORD
vs.
ISAAC SCOTT, Appellee.

APPEAL FROM ST. CLAIR.

BRIEF OF APPELLEE.

This action was commenced in the St. Clair County Circuit Court upon a promissory note executed by Henry Farr, Geo. L. Rutherford and Sam'l. Stites, since deceased. The declaration contains special count on the note, and the usual common counts. Judgment by default was taken against Farr. Rutherford plead general issue, and filed two special pleas to first count of declaration; the first alleging that at the time of making said note, Farr and wife executed a mortgage to Rutherford and Stites, for the purpose of securing them on account of said note, on certain lots in O'Fallon; that afterwards, Farr, being desirous of selling one of said lots free from incumbrance the said *Scott*, in consideration that Rutherford would release said mortgage, and enter same satisfied, agreed to discharge said Rutherford from all liability on said note; that Rutherford, in consideration thereof, did enter said mortgage satisfied, of which pltff. then and there had notice, wherefore, &c. The second alleges that Rutherford and Stites were in fact securities for Farr on said note, and that to indemnify them as such securities Farr executed a mortgage to them, on certain lots in O'Fallon; that afterwards, *Scott* and Farr being desirous to have said mortgage satisfied of record, said Scott agreed to discharge Rutherford from all liability on said note if Rutherford would enter said mortgage satisfied; that in consideration thereof Rutherford did enter said mortgage satisfied, whereby, &c.

It is not denied that Farr executed a mortgage to Rutherford and Stites to indemnify them as securities on the note in question; nor that said mortgage was entered satisfied of record by Rutherford at or about the time stated in said pleas. The point in controversy is the terms upon which Rutherford was to be released from liability on said note.

It appears from the evidence that Farr had an opportunity to sell one of the lots upon which he had given the mortgage, and desired to get the mortgage released, to enable him so to do. He then proposed to Scott to give him a mortgage on the other lot to secure him, so that Rutherford and Stites could be discharged and release their mortgage. Scott testifies that he consented that such an arrangement might be made. Upon Scott's consenting to the arrangement proposed it appears that Rutherford, without the knowledge of Scott, went to the records and satisfied his mortgage. It is not denied that Rutherford acted in good faith at the time, but he was too hasty, and no blunder on his part, in howsoever good faith it may have been committed, ought to prejudice the rights of Scott in the premises. Rutherford now claims that Scott agreed to release the securities on the note, if they would give up *their* security! He seeks to make it appear that Scott was first to release his security and then run the risk of getting a mortgage from Farr! The defendants below, while on the witness stand, both labored thus to construe the agreement, but it is easily seen from their testimony that there was something else in the agreement—some condition to be performed by Farr, before the securities on the note could claim to be released. The plain natural statement of Scott contrasts strongly with the testimony of the defendants below. Scott's course was that which any prudent business men would take, but Farr and Rutherford seek to construe his agreement into one which nobody but an insane man would make.

The testimony of James H. Scott shows (if it shows anything) that there was a condition to be performed by Farr before the securities could be released. He was mistaken, however, as to what that condition was. It does not occur to counsel for appellant that James H. Scott may have a "defective memory."

It is claimed by appellant that Rutherford did all that any of the parties pretends he was to do in order to be discharged from the note. It is not claimed by appellee that Rutherford was to deliver the new mortgage to Scott, but it is claimed that Rutherford and Stites were not to be released *until Scott had a mortgage*,—no matter who might be the person to deliver it. And Rutherford should have seen that *somebody* had delivered it before entering his mortgage satisfied. Scott testifies that he had no interest whatever in making the change, and that the security he consented to take was not so good as that he already had. Whose duty was it, then, to see that the arrangement which Scott "consented might be made," was carried out? Clearly those who were to be benefited by the arrangement. Rutherford did not exercise ordinary prudence in the matter. Instead of ascertaining from Scott, before satisfying his mortgage whether the conditions upon which he was to be discharged had been complied with, and demanding the note, with thoughtless haste he goes to the records, cuts off his own security, and now tries to make an innocent party bear the loss resulting from his indiscretion! Scott did not know until a year afterwards that Rutherford had entered his mortgage satisfied. Why did not Rutherford demand the note if he and Stites were released therefrom? The very fact that the note was never called for was enough to lead Scott to conclude that the arrangment proposed by Farr had been abandoned; and as long as he was allowed to hold the note he had the best evidence that the makers thereof were not released. Appellant rests his defence upon the groud that Scott agreed to discharge Rutherford, if he, Rutherford would enter his mortgage satisfied. The first special plea alleges that *Farr* being desirous of having the mortgage satisfied, *Scott* agreed to discharge Rutherford, if &c. The second that Farr *and Scott* being desirous &c., Scott agreed to release Rutherford, if &c. Why Scott should be so desirous of having mortgage satisfied in which he had no interest whatever, that he would be willing to release the securities on the note held by him on condition that they would enter said mortgage satisfied, is not apparent. The pleas are defective, but if they were sufficient the evidence in the case does not show that Rutherford was to be released until Scott had a mortgage from Farr.

MARSHALL W. WEIR, Att'y. for Appellee.

Henry Farr & Co
George L. Rutherford
vs
Isaac Scott Appellee
Brief of Appellee.

Filed 2nd June 1869
R. A. Williams
Clk

Supreme Court of Illinois---First Grand Division.

JUNE TERM, 1869.

HENRY FARR AND GEORGE L. RUTHERFORD
vs.
ISAAC SCOTT.
} Appeal from St. Clair.

Page 4 Isaac Scott brought an action of assumpsit in the St. Clair Circuit Court, at its October term, 1868, on a promissory note made to him by Henry Farr, George L. Rutherford, and Samuel Stites, since deceased, dated March 11, 1862, for the payment of $200 in gold, twelve months after date,
" 5 with interest at ten per cent from date. The declaration has first count on said note, and adds
" 8 the common counts. Farr let judgment go by default. Rutherford plead—1st, the general issue; 2d, to 1st count, that at and before the making of said note, said Farr and wife, for the purpose of securing said Stites and Rutherford on account of said note, upon which note Farr was principal and said Rutherford and Stites securities, made their mortgage to Rutherford and Stites upon two lots (described) in the town of O'Fallon, recorded, &c., in the Recorder's office of said county. And afterwards, to-wit: on the 6th of November, 1863, at the county aforesaid, the said Farr being desirous of selling one of said lots free from said mortgage incumbrance, the said plaintiff then and there, in consideration that said Rutherford would then and there release said
" 9 mortgage of record and enter the same satisfied, then and there agreed to discharge said Rutherford from all liability, on account of said promissory note. Plea then avers that Rutherford, in consideration thereof, did then and there enter of record on the margin of said mortgage, the same as satisfied, of which said plaintiff then and there and before the commencement of this suit had notice; wherefore said defendant says he was and is discharged from said promissory note, and this he was ready to verify, wherefore he prayed judgment, &c.

3d. Plea of Rutherford to 1st count avers that said Rutherford and Stites were in fact mere securities for said Farr on said note, and at and before the making thereof, to-wit: on &c., at &c., aforesaid, said Farr made and delivered to said securities, to indemnify them as such securities, a mortgage upon certain property and lots in O'Fallon, in said county, which mortgage is recorded in the Recorder's office in said county in book J 3, page 283. And afterwards, to-wit: on the 6th of November, A. D. 1863, at the county aforesaid, said plaintiff and said Farr being desirous to have said mortgage satisfied of record, the said plaintiff then and there agreed to discharge said Rutherford from all liability on account of said promissory note if said Rutherford would then and there enter said mortgage satisfied. Plea avers that in consideration thereof said Rutherford did then and there enter said mortgage satisfied of record, whereby, &c. (conclusion as in second plea.)

" 10 Pltff. took issue on 1st plea and replied to second and third pleas that he did not agree with the defendant, Rutherford, to discharge him from all liability, on account of the note sued on, in manner and form as alleged in said pleas, or either of them; and concluded to the country, upon which there was issue.

" 12 The suit was tried by the Court by consent. Plaintiff then introduced in evidence the promissory note sued on, with a credit on the back of two and a half years' interest endorsed. Henry Farr, witness, (for deft.) testified that he was principal on said promissory note, and the other two makers were securities. That in November, 1863, witness was desirous of selling one of the lots upon which he had given his securities a mortgage to indemnify them as such securities, and proposed to plaintiff to give him a mortgage on the other of said lots, and that Rutherford and plaintiff were at the house of witness in O'Fallon, and that witness promised plaintiff to give him a mortgage on said lot, and that plaintiff promised Rutherford if he would release the mortgage to him and Stites, on the record, Rutherford and Stites should be discharged from said note. That Rutherford released said mortgage accordingly, and witness made a mortgage on
' 13 said lot to plaintiff, and had the same stamped and acknowledged before a justice of the peace, which mortgage plaintiff never called for afterwards and never received. Witness conveyed the other lot to one Crouse.

James H. Scott testified that some nine months ago he told plaintiff that Rutherford said he, Rutherford, ought not to pay the note; that plaintiff had agreed to release him if he would enter the mortgage satisfied. Plaintiff told witness that was so, but it was on the condition that Farr would pay the note, which he had not done. That plaintiff thought that Rutherford ought to have seen that Farr paid the note.

George L. Rutherford testified that by appointment he and plaintiff met at the house of Farr, and witness refused to enter the mortgage satisfied unless plaintiff would release him and Stites from the note sued on, and he asked plaintiff if he would do so, to which plaintiff assented, and then witness came to Belleville and entered said mortgage satisfied of record. A year or so after Farr had removed to Missouri plaintiff came to witness and inquired about the note, and told witness it was unpaid. Witness then was somewhat astonished, and called plaintiff's attention to said agreement to discharge him. Plaintiff said he had forgotten about the mortgage Farr was to give him, and would look among his papers at home, and would ascertain at Belleville if he had not left it there to be recorded. Afterwards witness requested plaintiff to sue upon the note,
' 14 that he might make his defense. That witness had confided in the honor of plaintiff.

Isaac Scott, pltff., testified that Farr proposed to witness to take a mortgage on one of said lots, to secure him, so that Rutherford and Stites could release their mortgage and thereby enable Farr to sell one of said lots. Witness consented that such an arrangement might be made. That Rutherford afterwards asked witness if he agreed to that arrangement, to which plaintiff assented. Witness further testified that that he never agreed to release Rutherford without first getting a mortgage on one of said lots. That no such mortgage had ever been given to him or tendered to him. That about a year after the conversation with Farr witness spoke to Rutherford about the note, when Rutherford told him (witness) that he (Rutherford) had satisfied his mortgage, which was the first intimation witness had that Rutherford had satisfied the mortgage. Witness then told Rutherford that he (Rutherford) had been too hasty; that he should have seen that witness had a mortgage before satisfying his own. Witness further testified that the

security he consented to take was not so good as that he already had, and that he had no interest whatever in making the change. That after the conversation with Rutherford he did look among his papers and at the Recorder's office in Belleville, although positive that he never received such a mortgage. Witness further stated that Rutherford never at any time asked for or
" 15 demanded the note sued on. Witness further testified that according to the agreement made with Farr, he, Farr, was first to make a mortgage to witness; then Rutherford and Stites might be released. This was all the evidence in the case, after which the Court found for Scott the amount due on said note; whereupon Rutherford moved for a new trial, because the finding was contrary to law and to evidence, which motion was overruled by the Court, and to which decision
11, 16 of the Court Rutherford at the time excepted. Appeal to Supreme Court allowed and bond filed.
" 1 Rutherford assigns for error the finding of the issue of fact for Scott and the refusing to grant Rutherford a new trial.

BRIEF.

1. The only point by the pleadings in issue is: Did Scott agree to discharge Rutherford if he entered his mortgage satisfied? Farr and Rutherford swear that he did, and he admitted substantially the same thing to James H. Scott. Scott, the pltff. below, has a memory so defective that he cannot rely upon it himself, and from the testimony of the other witnesses no Court could safely rely on it. In his conversation with James H. Scott and with Rutherford, when he first spoke of the note being unpaid, he appears to have forgotten all about the mortgage that was to be made to him and promised Rutherford to look and did look for it among his papers and at the Recorder's office in Belleville. Nine months before this suit the only reason he gives James H. Scott why Rutherford should pay this note was, that Rutherford was to be released on condition that Farr paid the note, and Rutherford ought to have seen, not that a new mortgage was made, but that Farr *paid* the note! He, however, now swears that he was first to have a new mortgage before Rutherford was to be released. He does not pretend that he told this to Rutherford either at the appointed meeting at Farr's or before Rutherford satisfied his mortgage. Farr appears to have made, stamped, and acknowledged before a justice of the peace a mortgage to Scott under the arrangement, which Scott never called for. It is not pretended by even Scott that Rutherford was to deliver him this mortgage or do anything with it. Rutherford did all any of the parties pretends he was to do to be discharged from the note, and by the conduct of Scott he lost the benefit of his mortgage, and ought not to suffer thereby.

2. Even where a note is joint and several, as between the parties and against the payee, it may be proved *aliunde* that only one of the makers was principal and the others securities. Kennedy, &c., vs. Evans, 31 Ill. R., 269. Wood vs. Stout, 32 Ill. R., 401, 409.

B. Any agreement between payee and principal of a note, made before or after its maturity, changing the terms of a note, without consent of security, discharges him at law and in equity. Warner vs. Campbell, 26 Ill. R., 285, 286. Flynn, &c., vs. Mudd, &c., 27 Ill. R., 326.

C. This defence may be made in a court of law, as well as in equity. 27 Ill. R., 327. Ward vs. Stout, 32 Ill. R., 401. Kennedy vs. Evans, 31 Ill. R., 269.

D. In Pearl vs. Wellmann, 11 Ill. R., 358, Trumbull, Judge. says, where a creditor does some act by which the security has lost or been induced to neglect the means which might have been used for his indemnity—as in 8 Fisk, 122, where the creditor told the security the debt was paid—the security is discharged. A creditor, who, by any act of his, has induced the security to believe that he was discharged, and thereby led him to part with his means of indemnity, ought to be estopped by such act from subsequently proceeding against the surety.

3 The finding was manifestly against the evidence and the weight of evidence, and a new trial should have been granted. Scott vs. Plumb, 2 Gil. 595; Keag vs. Hite, 12 Ill. R., 99; Swab vs. Gingerich, 13 Id., 698, 699; Goodner vs. Crooks, 11 Id., 142; Baker vs. Intchett, 16 Id., 66; Clement vs. Bushway, 25 Id., 200; Henry vs. Eddy, 34 Id., 514; Koester vs. Eslinger, June Term, 1867, at Mount Vernon. This is especially true when the case is tried by the Court.

WM. H. UNDERWOOD, Atty. for Appellant.

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Hamet al

vs.

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Abstract & Brief

Filed 1st June 1809

R. D. Williams

Clerk

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It is not denied that Farr executed a mortgage to Rutherford and Stites to indemnify them as securities on the note in question; nor that said mortgage was entered satisfied of record by Rutherford at or about the time stated in said pleas. The point in controversy is the terms upon which Rutherford was to be released from liability on said note.

It appears from the evidence that Farr had an opportunity to sell one of the lots upon which he had given the mortgage, and desired to get the mortgage released, to enable him so to do. He then proposed to Scott to give him a mortgage on the other lot to secure him, so that Rutherford and Stites could be discharged and release their mortgage. Scott testifies that he consented that such an arrangement might be made. Upon Scott's consenting to the arrangement proposed it appears that Rutherford, without the knowledge of Scott, went to the records and satisfied his mortgage. It is not denied that Rutherford acted in good faith at the time, but he was too hasty, and no blunder on his part, in howsoever good faith it may have been committed, ought to prejudice the rights of Scott in the premises. Rutherford now claims that Scott agreed to release the securities on the note, if they would give up *their* security! He seeks to make it appear that Scott was first to release his security and then run the risk of getting a mortgage from Farr! The defendants below, while on the witness stand, both labored thus to construe the agreement, but it is easily seen from their testimony that there was something else in the agreement—some condition to be performed by Farr, before the securities on the note could claim to be released. The plain natural statement of Scott contrasts strongly with the testimony of the defendants below. Scott's course was that which any prudent business men would take, but Farr and Rutherford seek to construe his agreement into one which nobody but an insane man would make.

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It is claimed by appellant that Rutherford did all that any of the parties pretends he was to do in order to be discharged from the note. It is not claimed by appellee that Rutherford was to deliver the new mortgage to Scott, but it is claimed that Rutherford and Stites were not to be released *until Scott had a mortgage*,—no matter who might be the person to deliver it. And Rutherford should have seen that *somebody* had delivered it before entering his mortgage satisfied. Scott testifies that he had no interest whatever in making the change, and that the security he consented to take was not so good as that he already had. Whose duty was it, then, to see that the arrangement which Scott "consented might be made," was carried out? Clearly those who were to be benefited by the arrangement. Rutherford did not exercise ordinary prudence in the matter. Instead of ascertaining from Scott, before satisfying his mortgage, whether the conditions upon which he was to be discharged had been complied with, and demanding the note, with thoughtless haste he goes to the records, cuts off his own security, and now tries to make an innocent party bear the loss resulting from his indiscretion! Scott did not know until a year afterwards that Rutherford had entered his mortgage satisfied. Why did not Rutherford demand the note if he and Stites were released therefrom? The very fact that the note was never called for was enough to lead Scott to conclude that the arrangment proposed by Farr had been abandoned; and as long as he was allowed to hold the note he had the best evidence that the makers thereof were not released. Appellant rests his defence upon the groud that Scott agreed to discharge Rutherford, if he, Rutherford would enter his mortgage satisfied. The first special plea alleges that *Farr* being desirous of having the mortgage satisfied, *Scott* agreed to discharge Rutherford, if &c. The second that Farr *and Scott* being desirous &c., Scott agreed to release Rutherford, if &c. Why Scott should be so desirous of having mortgage satisfied in which he had no interest whatever, that he would be willing to release the securities on the note held by him on condition that they would enter said mortgage satisfied, is not apparent. The pleas are defective, but if they were sufficient the evidence in the case does not show that Rutherford was to be released until Scott had a mortgage from Farr.

MARSHALL W. WEIR, Att'y. for Appellee.

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Henry Farr &
George L. Rutherford
vs
Isaac Scott, Appellee.

Brief of Appellee.

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